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No. 80-648

In the Supreme Court of the United States

OCTOBER TERM, 1980

EUROPEAN TRADE SPECIALISTS, INC., AND KUNZLE & TASIN, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES AND THE FEDERAL MARITIME COMMISSION IN OPPOSITION

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Petitioners contend (Pet. 16-17) that the Federal Maritime Commission erred by failing to enforce their common law claims in an administrative proceeding brought under the Shipping Act of 1916.

1. Petitioners European Trade Specialists, Inc., a shipper, and Kunzle & Tasin, its consignee, filed a complaint with the Federal Maritime Commission, alleging that they had been overcharged by Prudential-Grace Lines on a shipment of products. Petitioners asserted that the overcharge was unreasonably prejudicial and unjustly discriminatory, in violation of Sections 16 and 17 of the Shipping Act of 1916, 46 U.S.C. 815 and 816. They also claimed that the overcharge was the result of a misclassification of the commodity involved under the carrier's tariff, in violation of Section 18(b)(3) of the Act, 46 U.S.C. 817(b)(3). Petitioners

further charged that the Hipage Company, a freight forwarder, had granted an unreasonable preference under Section 16 and engaged in an unreasonable practice under Section 17, because it breached its fiduciary duty when it prepared the bill of lading and consented to the excessive charge without consulting with petitioner European Trade Specialists (Pet. App. xxiv).

Although the alleged overcharge was only $2,532, petitioners sought consequential damages totalling over $247,000. They also demanded additional unspecified "punitive" damages in light of the alleged "aggravated circumstances" involved.

The Commission held that the carrier had misclassified the shipment, and awarded petitioners the amount of the overcharge ($2,532) plus interest ($1,038) under Section 18(b)(3) of the Act (Pet. App. xi-xviii). The Commission found no violation of Section 16, however, because petitioners failed to show that the overcharge prejudiced them by conferring any competitive advantage on other shippers (Pet. App. xxxiii-xxxxi, lii-lvi). The Commission further found that the carrier had not violated Section 17 of the Act, either by discrimination (since the carrier favored no competitor) or by unreasonable practices (since the carrier was not obligated to adhere to an agent's rate quotation as petitioners claimed) (Pet. App. lvi-lxii). Finally, the Commission found that the freight forwarder had not violated Section 17, since no "practice" of failing to notify shippers of unanticipated increases in charges was proven (Pet. App. xvii).[1]

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[1]The administrative law judge found that the freight forwarder had in fact contacted petitioner European Trade Specialists regarding the reclassification of the cargo (Pet. App. ix).

The court of appeals affirmed in a per curiam judgment, stating that it was of the view "that the order of the Federal Maritime Commission is supported by substantial evidence, is not arbitrary or capricious, and is otherwise free of reversible legal error" (Pet. App. iv).

2. There is no merit to petitioners' contention (Pet. 16-17) that the Shipping Act incorporates all common law rights and remedies that shippers and their consignees may have against carriers and freight forwarding agents. As the Commission noted, the Act was not intended to supplant all "principles of common law" applicable to contracting parties or the principal-agent relationship (Pet. App. xxxx). The Act forecloses common law remedies only to the extent that they are inconsistent with it; otherwise those remedies survive and may be enforced in the courts. See generally *Hewitt-Robins Incorporated* v. *Eastern Freight-Ways, Inc.*, 371 U.S. 84, 87-88 (1962).

Contrary to petitioners' assertion (Pet. 17-18), the doctrine of primary jurisdiction did not foreclose their common law remedies, if any. Even if a court entertaining petitioners' common law claims were required to refer certain issues to the Commission pursuant to the primary jurisdiction doctrine (*Port of Boston Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 68-69 (1970)), the referring court still would retain jurisdiction to award appropriate relief on the original complaint after the administrative process had run its course. *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 222-224 (1966).[2] Since petitioners did not file any proceeding in an appropriate court to enforce their common law rights, this case plainly is not an appropriate

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[2] *Rivoli Trucking Corp.* v. *New York Shipping Ass'n*, 167 F. Supp. 943 (S.D. N.Y. 1957), relied on by petitioners, is no longer viable authority following this Court's decision in *Carnation*.

vehicle for defining those common law rights. And since they have sought no judicial relief, there is no merit to their assertion that they suffered a wrong without a remedy.[3].

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
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BRIEN E. KEHOE
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Federal Maritime Commission

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[3]Petitioners also argue (Pet. 20-21), in reliance on *Volkswagenwerk* v. *FMC*, 390 U.S. 261 (1968), that the Commission erroneously required a showing of competitive harm under Sections 16 and 17 of the Act. But in *Volkswagenwerk*, this Court specifically pointed out that the Commission applies a "competitive relationship" analysis in cases such as this, involving ocean freight rates. *Id.* at 279-280; see also *id.* at 292-293 (Harlan, J., concurring).

Petitioners further contend (Pet. 22-23) that the Commission misconstrued the statutory requirement that freight forwarders "observe and enforce" reasonable practices, and failed to apply the proper measure of damages under *Consolo* v. *FMC*, 383 U.S. 607, 622 (1966). However, neither of these claims was presented to the Commission, and there is no need for this Court to review them now. See, *e.g.*, *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952). We note, moreover, that *Consolo* was a discrimination case, and the measure of damages traditionally has been different in simple overcharge cases. See, *e.g.*, *ICC* v. *United States ex rel. Campbell*, 289 U.S. 385, 389-390 (1933).